(5)

No. 05-785

FILED

JUN 22 2006

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The
Supreme Court of the United States

THOMAS L. CAREY, Warden,

Petitioner,

v.

MATHEW MUSLADIN,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S BRIEF ON THE MERITS

BILL LOCKYER
Attorney General of California
ROBERT R. ANDERSON
Chief Assistant Attorney General
GERALD A. ENGLER
Senior Assistant Attorney General
DONALD E. DE NICOLA
Deputy Solicitor General
PEGGY S. RUFFRA
Supervising Deputy Attorney General
GREGORY A. OTT
Deputy Attorney General
Counsel of Record
455 Golden Gate Avenue, Suite 11000
San Francisco, CA 94102-7004
Telephone: (415) 703-5964
Fax: (415) 703-1234
Counsel for Petitioner

QUESTION PRESENTED

In the absence of controlling Supreme Court law, did the Court of Appeals for the Ninth Circuit exceed its authority under 28 U.S.C. § 2254(d)(1) by overturning respondent's state conviction of murder on the ground that the courtroom spectators included three family members of the victim who wore buttons depicting the deceased?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	1
STATEMENT OF THE CASE	2
SUMMARY OF ARGUMENT	10
ARGUMENT	12
THE STATE COURT'S DECISION DESERVED HEIGHTENED DEFERENCE UNDER AEDPA SINCE IT INVOLVED THE APPLICATION OF A GENERAL RULE WITH UNCLEAR CONTOURS, AND NO CASES OF THIS COURT ADDRESS SIMILAR FACTS	12
A. The Ninth Circuit's Wholesale Reliance On *Norris* Contravened AEDPA	13
1. Circuit and state precedent have no role in defining or shaping "clearly established" federal law for purposes of § 2254(d)(1)	14
2. The state court decision deserved heightened deference in its application of this Court's general rule	18
B. The Ninth Circuit's Piecemeal Reading Of The State Court Opinion Denied It The Deference Mandated By AEDPA	30

TABLE OF CONTENTS – Continued

Page

C. The Ninth Circuit's Conclusion That An Inherently Prejudicial Courtroom Practice Constitutes Structural Error Is Contrary To This Court's Precedent 36

CONCLUSION 40

TABLE OF AUTHORITIES

Page

CASES

Arizona v. *Fulminante*, 499 U.S. 279 (1991) 37

Arizona v. *Washington*, 434 U.S. 497 (1978) 29

Arizonans for Official English v. *Arizona*, 520 U.S. 43 (1997) 17, 22, 23

Bell v. *Cone*, 535 U.S. 685 (2002) 12

Bell v. *Hill*, 190 F.3d 1089 (9th Cir. 1999) 17

Bell v. *Jarvis*, 236 F.3d 149 (4th Cir. 2000) 21

Bell v. *True*, 413 F. Supp. 2d 657 (W.D. Va. 2006) 34

Billings v. *Polk*, 441 F.3d 238 (4th Cir. 2006) 23, 26

Bocian v. *Godinez*, 101 F.3d 465 (7th Cir. 1996) 21

Brecht v. *Abrahamson*, 507 U.S. 619 (1993) ... 24, 32, 37, 38, 39

Brown v. *Payton*, 544 U.S. 133 (2005) 18, 23

Buckner v. *State*, 714 So. 2d 384 (Fla. 1998) 26, 29

Cagle v. *State*, 68 Ark. App. 248, 6 S.W.3d 801 (1999) 26, 29

Chadwick v. *Janecka*, 312 F.3d 597 (3d Cir. 2002) 20

Chapman v. *California*, 386 U.S. 18 (1967) 38

Collins v. *Rice*, 126 S. Ct. 969 (2006) 28

Coy v. *Iowa*, 487 U.S. 1012 (1988) 34

Davis v. *State*, 2006 Tex. App. LEXIS 3882 (2006) 26

Deck v. *Missouri*, 544 U.S. 622 (2005) 12, 15, 38

Donnelly v. *DeChristoforo*, 416 U.S. 637 (1974) 28

Duhaime v. *Ducharme*, 200 F.3d 597 (9th Cir. 2000) ... 16, 21

Early v. *Packer*, 537 U.S. 3 (2002) 31, 32

TABLE OF AUTHORITIES – Continued

Page

Estelle v. *McGuire*, 502 U.S. 62 (1991) 15, 24

Estelle v. *Williams*, 425 U.S. 501 (1976) 7-11, 15, 17, 19, 20, 24-27, 31-33, 36, 38

Gideon v. *Wainwright*, 372 U.S. 335 (1963) 37

Hill v. *Ozmint*, 339 F.3d 187 (4th Cir. 2003) 34

Holbrook v. *Flynn*, 475 U.S. 560 (1986) 5-11, 15, 17, 18, 20, 24-26, 31, 33-36

Howard v. *State*, 941 S.W.2d 102 (Tex. Crim. App. 1996) 26, 34

In re Woods, 154 Wash. 2d 400, 114 P.3d 607 (2005) 26, 29

Johnson v. *Commonwealth*, 259 Va. 654, 529 S.E.2d 769 (2000) 26, 29

Kane v. *Espitia*, 126 S. Ct. 407 (2005) 14

Kenyon v. *State*, 58 Ark. App. 24, 946 S.W.2d 705 (1997) 26, 29

Kinnamon v. *Scott*, 40 F.3d 731 (5th Cir. 1994) 27

Kotteakos v. *United States*, 328 U.S. 750 (1946) 38

Lindh v. *Murphy*, 521 U.S. 320 (1997) 13, 32

Lockhart v. *Fretwell*, 506 U.S. 364 (1993) 17, 22

Lockyer v. *Andrade*, 538 U.S. 63 (2003) 19, 23, 28

Marx v. *State*, 987 S.W.2d 577 (Tex. Crim. App. 1999) 34

McKaskle v. *Wiggins*, 465 U.S. 168 (1984) 37

Middleton v. *McNeil*, 541 U.S. 433 (2004) 35

Mitchell v. *Esparza*, 540 U.S. 12 (2003) 14

TABLE OF AUTHORITIES – Continued

Page

Mitchell v. *State*, 884 P.2d 1186 (Okla. Crim. App. 1994) 26, 29

Mitzel v. *Tate*, 267 F.3d 524 (6th Cir. 2001) 21

Morgan v. *Aispuro*, 946 F.2d 1462 (9th Cir. 1991) 34

Musladin v. *Lamarque*, 403 F.3d 1072 (9th Cir. 2005) 7, 21

Musladin v. *Lamarque*, 427 F.3d 653 (9th Cir. 2005) 7, 9

Neder v. *United States*, 527 U.S. 1 (1999) 37

Nguyen v. *State*, 977 S.W.2d 450 (Tex. App. 1998) 26, 29

Norris v. *Risley*, 918 F.2d 828 (9th Cir. 1990) 5, 7-9, 11, 13, 16-17, 20, 22, 30, 32, 36

Ouber v. *Guarino*, 293 F.3d 19 (1st Cir. 2002) 20

Pachl v. *Zenon*, 145 Or. App. 350, 929 P.2d 1088 (1996) 26, 30

People v. *Barrick*, 33 Cal. 3d 115, 654 P.2d 1243, 187 Cal. Rptr. 716 (1982) 6

People v. *Bradley*, 1 Cal. 3d 80, 460 P.2d 129, 81 Cal. Rptr. 457 (1969) 17, 22

People v. *Houston*, 130 Cal. App. 4th 279, 29 Cal. Rptr. 3d 818 (2005) 26, 29

People v. *King*, 214 Mich. App. 301, 544 N.W.2d 765 (1996) 26, 29

People v. *Madaris*, 122 Cal. App. 3d 234, 175 Cal. Rptr. 869 (1981) 6

Price v. *Vincent*, 538 U.S. 634 (2003) 20, 22

Rose v. *Clark*, 478 U.S. 570 (1986) 37

TABLE OF AUTHORITIES – Continued

Page

State v. *Bradford*, 254 Kan. 133, 864 P.2d 680 (1993) 27, 29

State v. *Braxton*, 344 N.C. 702, 477 S.E.2d 172 (1996) 26, 29

State v. *Franklin*, 174 W. Va. 469, 327 S.E.2d 449 (1985) 30

State v. *Lord*, 128 Wash. App. 216, 114 P.3d 1241 (2005) 26, 29

State v. *McNaught*, 238 Kan. 567, 713 P.2d 457 (1986) 27, 29, 30

State v. *Nelson*, 705 So. 2d 758 (La. Ct. App. 1997).... 26, 30

State v. *Richey*, 171 W. Va. 342, 298 S.E.2d 879 (1982) 26

State v. *Speed*, 265 Kan. 26, 961 P.2d 13 (1998) 26, 29

State v. *Wilson*, 406 N.W.2d 442 (Iowa 1987) 34

Sullivan v. *Louisiana*, 508 U.S. 275 (1993) 37

Tumey v. *Ohio*, 273 U.S. 510 (1927) 37

Tyler v. *Cain*, 533 U.S. 656 (2001) 14

United States v. *Harris*, 703 F.2d 508 (11th Cir. 1983) 34, 38

United States v. *Milner*, 962 F.2d 908 (9th Cir. 1992) 34

United States v. *Olvera*, 30 F.3d 1195 (9th Cir. 1994) 34

United States v. *Rutledge*, 40 F.3d 879 (11th Cir. 1994) 29

Vasquez v. *Hillery*, 474 U.S. 254 (1986) 37

TABLE OF AUTHORITIES – Continued

Page

Waller v. *Georgia*, 467 U.S. 39 (1984) 37

Weeks v. *Angelone*, 528 U.S. 225 (2000) 29

Whitehead v. *Cowan*, 263 F.3d 708 (7th Cir. 2001) 27

Williams v. *Bowersox*, 340 F.3d 667 (8th Cir. 2003) 20

Williams v. *Taylor*, 529 U.S. 362 (2000) 13, 14, 18, 23, 24

Williams v. *Woodford*, 384 F.3d 567 (9th Cir. 2004) 34

Woodford v. *Visciotti*, 537 U.S. 19 (2002) .. 12, 18, 28, 32, 33, 35

Woods v. *Dugger*, 923 F.2d 1454 (11th Cir. 1991) 5

Yarborough v. *Alvarado*, 541 U.S. 652 (2004) 14, 17, 19, 23, 24, 27

Young v. *Callahan*, 700 F.2d 32 (1st Cir. 1983) 38

CONSTITUTIONAL PROVISIONS

United States Constitution
Sixth Amendment 1

Eighth Amendment 19

Fourteenth Amendment 1

STATUTES

Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 104(3), 110 Stat. 1214 2

California Civil Procedure Code
§ 2002 6

§ 2003 6

§ 2015.5 6

TABLE OF AUTHORITIES – Continued

Page

California Penal Code
§ 21a 5
§ 187(a) 5
§ 189 5
§ 245(a)(1) 5
§ 459 5
§ 460(a) 5
§ 664 5
§ 12022.5(a)(1) 5

United States Code, Title 28
§ 1254(1) 1
§ 2244(d)(2)(A)(i) 2, 14
§ 2254 7
§ 2254(d) 9, 32
§ 2254(d)(1) 11, 13, 14, 17-23, 31, 35, 38, 39

OTHER AUTHORITIES

Recent Case, Musladin *v.* Lamarque, *403 F.3d 1072 (9th Cir. 2005)*, 119 HARV. L. REV. 1931 (2006) .. 14, 16, 21

Terri A. Belanger, *Symbolic Expressions in the Courtroom: The Right to a Fair Trial Versus Freedom of Speech*, 62 GEO. WASH. L. REV. 318 (1994) 19

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-18a, is reported at 427 F.3d 653. The order denying rehearing and rehearing en banc, Pet. App. 19a-30a, is reported at 427 F.3d 647. The district court's opinion is unreported. Pet. App. 31a-54a. The opinion of the state court of appeal is unreported. Pet. App. 55a-78a, 80a. The orders of the state supreme court on direct review and on habeas corpus are unreported. Pet. App. 79a, 81a.

JURISDICTION

The judgment of the court of appeals was entered on October 21, 2005. Pet. App. 1a. A petition for rehearing and rehearing en banc was denied on the same day. Pet. App. 19a. The petition for a writ of certiorari was filed on December 15, 2005, and was granted on April 17, 2006. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury . . . ."

The Fourteenth Amendment to the United States Constitution provides that no state "shall deprive any person of life, liberty, or property, without due process of law."

28 U.S.C. § 2254(d)(1) provides: "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—[¶] resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 104(3), 110 Stat. 1214, 1219 (AEDPA).

STATEMENT OF THE CASE

1. In 1994, respondent Mathew Musladin shot and killed Tom Studer, the fiancé of his estranged wife Pamela Musladin. Reporter's Transcript of Trial (RT) 477-78, 487. Respondent had been engaged in a protracted custody dispute with Pamela over their child Garrick. RT 478-82, 491. Under a custody arrangement, Garrick lived with Pamela, while respondent had a right of visitation. RT 479-80. Respondent had warned his wife during a domestic violence incident shortly after she filed for divorce that he would kill her before he would let her raise Garrick. RT 480-84, 488-91. Respondent also had warned Studer in 1993, "Yours is about to come. You will know it when it happens because you won't be around. And, you'll get yours, just remember that." RT 1734; see RT 703.

On May 13, 1994, a visitation day a few months after respondent bought his gun, the prosecutor's office contacted respondent about his refusal to pay child support. Shortly afterward, respondent appeared unexpectedly

early at the residence Pamela shared with Studer. RT 478-80, 492-95. After securing Garrick in his car, respondent announced, "'I got a call from the district attorney this morning and that's the last straw. I don't have anything left to lose.'" He continued, "'Either you sign full custody of Garrick over to me right now or I will blow both of your fucking heads off.'" RT 500-02.

Pamela started begging respondent, who shoved her on the ground. RT 502-03. Studer helped her up as her brother Mike Albaugh came outside. RT 509, 624. Neither Albaugh nor Studer was armed. RT 514, 545, 625, 640-43. Respondent reached underneath the seat of his car, took out the gun, and shot Studer in the back. RT 511-12, 625-29, 705-06, 722. Respondent walked into the garage to the front end of Studer's truck under which Studer tried to crawl and, despite Albaugh's plea that he stop, shot Studer again. Studer was struck in the head, apparently from a ricochet, as he lay partially under the truck. He died instantly. RT 629-31, 721, 723-30, 846-47, 905-08, 927, 1888, 1894.

Respondent next entered the house, kicked in a door, and pointed his gun directly at Albaugh, who had just taken refuge there after dialing 911. RT 631-34, 637-39. Respondent fled but was quickly apprehended driving his car. RT 999-1002, 1063-71. Respondent said to the police, "I didn't mean to do it. I'm sorry," and "Please, officer, forgive me." RT 1018.

2. Respondent testified at trial that he acted in self-defense. He claimed that when Mike Albaugh emerged from the house, Albaugh was wielding a machete, and was accompanied by an unarmed person near Pamela and a third person in the garage with a gun. Respondent testified he

shot at the person in the garage only because he was afraid for his life.

3. Before trial, outside the presence of the jury, respondent's counsel objected to spectators, members of Tom Studer's family, wearing buttons that depicted the decedent:

> [Defense counsel]: .... And this is about this matter and I just want to put on the record, Your Honor. This is in all due respect to the Studer family who is present here in the courtroom.
>
> I think it's inappropriate. They are wearing buttons that show a photograph of the decedent. I would like to just say for purposes of the record, Your Honor, this is a jury trial. If it was a court trial, I wouldn't mind. As jurors sit here, they have natural feelings and natural passions. They could be inflamed over the fact that there was a photograph on Ms. Studer's breast or photograph of the decedent on Mr. Studer's chest or on the brother's chest. I just think it's inappropriate, Your Honor. I would like to have - - they can stay here. There is no problem with that.
>
> THE COURT: I understand that. The button has nothing except a photograph?
>
> [Prosecutor]: That's correct, Your Honor.
>
> THE COURT: The jury's already been instructed not to let passion or prejudice influence their verdict and they will again be instructed at the close of the case on the same subject. There is no legend on the buttons. I see no possible prejudice to the defendant. The motion to have those removed is denied.

Joint Appendix (J.A.) 3-4. Neither the buttons nor the picture on them was seen by any court other than the state trial judge. See Pet. App. 73a-74a.

4. The jury convicted respondent of first degree murder, attempted premeditated murder, first degree burglary, and assault with a firearm, with personal use of a firearm. See Cal. Penal Code §§ 21a, 187(a), 189, 245(a)(1), 459, 460(a), 664, 12022.5(a)(1). He was sentenced to thirty-two years to life in prison. Pet. App. 33a, 55a.

5. The California Court of Appeal affirmed the judgment, rejecting respondent's contention that the spectators' buttons had deprived him of a fair trial. Pet. App. 55a. Citing *Holbrook* v. *Flynn*, 475 U.S. 560, 570 (1986), the state appellate court found that respondent had to show actual or inherent prejudice from the presence of the buttons. As respondent did not claim actual prejudice, the appellate court addressed inherent prejudice. Pet. App. 74a & n.11. It stated: "The test for inherent prejudice is . . . whether an unacceptable risk is presented of impermissible factors coming into play. This test requires us to examine two factors: first, whether there is an impermissible factor coming into play, and second, whether it poses an unacceptable risk." Pet. App. 74a (quoting *Woods* v. *Dugger*, 923 F.2d 1454, 1457 (11th Cir. 1991) (citations and internal quotation marks omitted)). Using that test the state court distinguished *Norris* v. *Risley*, 918 F.2d 828 (9th Cir. 1990), which overturned a conviction where several female spectators had worn large buttons reading "Women Against Rape" at a rape trial. The state court reasoned:

> [T]he message to be conveyed by the Studer family wearing buttons is less than clear. The simple photograph of Tom Studer was unlikely to have

> been taken as a sign of anything other than the normal grief occasioned by the loss of a family member. While we consider the wearing of photographs of victims in a courtroom to be an "impermissible factor coming into play," the practice of which should be discouraged, we do not believe the buttons in this case branded defendant "with an unmistakable mark of guilt" in the eyes of the jurors. (See *Holbrook* v. *Flynn*, *supra*, 475 U.S. at pp. 570-571.)

Pet. App. 74a-75a. Rehearing was denied. Pet. App. 80a. The California Supreme Court denied review. Pet. App. 79a.

6. In 1999, respondent filed a petition for writ of habeas corpus in the California Supreme Court. Respondent attached declarations by his mother and his trial counsel[1] alleging facts outside the trial record: The buttons were either two inches (trial counsel) or three to four inches (respondent's mother) in diameter, and were worn by Tom Studer's mother, father, and brother, each of whom attended most or all of the trial and sat in the front row of the gallery, behind the prosecutor. J.A. 6-8. Respondent's mother averred that Pamela Musladin, Pamela's mother, and Michael Albaugh wore the buttons on the first day of jury voir dire. J.A. 6. The habeas petition was denied without comment in 2000. Pet. App. 81a.

---

[1] Respondent's trial counsel's declaration was unsworn and undated. J.A. 8. It lacks probative value under California law. See Cal. Civ. Proc. Code §§ 2002-2003, 2015.5; *People* v. *Madaris*, 122 Cal. App. 3d 234, 242, 175 Cal. Rptr. 869, 873 (1981), *disapproved on other grounds in People* v. *Barrick*, 33 Cal. 3d 115, 127, 654 P.2d 1243, 1250, 187 Cal. Rptr. 716, 723 (1982).

7. The same year, respondent filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. In denying relief, the district court observed that this Court had not specifically addressed spectator buttons. It distinguished both *Estelle* v. *Williams*, 425 U.S. 501 (1976), which had held that compelling a defendant to wear jail clothing at trial violates the right to a fair trial, and *Norris*, 918 F.2d 828, which had involved courtroom practices "related directly to the respective defendant's guilt." Pet. App. 47a-50a. The district court found the "message to be derived from the buttons in this case . . . was not as clear" as that conveyed by the courtroom practices in *Williams* and *Norris*. "Although it amounted to a showing of solidarity by the victim's family, it did not necessarily undermine the presumption of innocence." The district court concluded, "Although allowing the buttons was arguably not a prudent decision by the trial judge, it cannot be said that it was contrary to or an unreasonable application of clearly established federal law" as set forth in *Williams*. Pet. App. 47a-50a, 54a.

8. On appeal, a divided panel of the Ninth Circuit reversed and granted the writ. *Musladin* v. *Lamarque*, 403 F.3d 1072 (9th Cir. 2005). Petitioner Carey filed a petition for rehearing with a suggestion for rehearing en banc.

9. On October 21, 2005, the Ninth Circuit filed a new opinion, without a change in the judgment. Pet. App. 1a-15a; *Musladin* v. *Lamarque*, 427 F.3d 653 (9th Cir. 2005). The Ninth Circuit's opinion, authored by Judge Reinhardt, held the state appellate court's rejection of the claim of constitutional error in allowing the spectators' buttons was an unreasonable application of *Estelle* v. *Williams*, 425 U.S. 501, and *Holbrook* v. *Flynn*, 475 U.S. 560. The Ninth Circuit accorded *Norris* v. *Risley*, 918 F.2d 828, "persuasive value"

in deciding that the state court's application of *Williams* and *Flynn* was unreasonable, particularly because the state court had discussed *Norris*. Pet. App. 7a-9a. *Norris*, according to the federal circuit court, could not "reasonably be distinguished," for the "message conveyed" by the buttons in the present case was "even stronger and more prejudicial" than the message conveyed by the "Women Against Rape" buttons worn by the *Norris* spectators. Pet. App. 8a, 13a. Specifically, the three buttons depicting Studer "essentially 'argue' that Studer was the innocent party and that the defendant was necessarily guilty; that the defendant, not Studer, was the initiator of the attack, and thus, the perpetrator of a criminal act." Pet. App. 13a. The appeals court additionally found that the state court acted "contrary to" and unreasonably applied *Williams* and *Flynn* by burdening respondent with an unnecessary element of proof, namely, that the buttons "branded" respondent with an "unmistakable mark of guilt." The federal court held that once the state court found an "impermissible factor," reversal was required without respondent having to show that he had been "branded." Pet. App. 10a-12a, 15a.

Judge Thompson dissented, finding that the state court's decision was neither contrary to nor an unreasonable application of established Supreme Court law. Pet. App. 15a. Judge Thompson found neither *Williams* nor *Norris* sufficiently analogous to respondent's case to compel relief, since the "message," if any, conveyed by the Studer family buttons was nothing more than the "normal grief occasioned by the loss of a family member." The state court's reference to its view that the buttons had not "branded" respondent, Judge Thompson explained, was simply shorthand for holding that the buttons were not so

inherently prejudicial as to violate respondent's right to a fair trial. Pet. App. 15a-18a.

10. On the same day, the Ninth Circuit denied petitioner Carey's petition for rehearing and rehearing en banc in a published order. Pet. App. 19a; *Musladin* v. *Lamarque*, 427 F.3d 647 (9th Cir. 2005). Judge Kleinfeld (joined by Judges Kozinski, O'Scannlain, Tallman, Bybee, Callahan, and Bea) dissented. Judge Kleinfeld contended that the court had "effectively erased" 28 U.S.C. § 2254(d) and that the panel's inquiry should have begun and ended with the fact that no clearly established Supreme Court case holds "silent signals of affiliation by spectators in a courtroom deny a defendant due process by eroding his presumption of innocence." Pet. App. 22a. His seven-judge dissent criticized the panel majority's extension of *Norris* to fill in conclusively the large gap between the two remotely analogous "bookends," *Williams* and *Flynn*. Pet. App. 22a-24a. Maintaining that the panel majority had departed from the decisions of other circuits, which properly constrain their reliance on circuit authority in cases arising under AEDPA, Judge Kleinfeld observed, "[O]ur panel is unique in how boldly it has flown in the face of the statutory restriction to Supreme Court decisions." Pet. App. 26a. He concluded that the panel majority had thus "arrogated to our court power that we do not legitimately possess," an error he believed was "symptomatic of a deeper problem than its misapplication of Supreme Court precedent to spectators' photo buttons." Pet. App. 27a.

Judge Kleinfeld also criticized as narrow and unyielding the panel majority's interpretation of the effect of the buttons, explaining that spectator alliances with a defendant or the prosecution are common, not improper, and part and parcel of the constitutional guarantee of a public

trial. Pet. App. 26a-28a. He predicted the decision would create confusion in the state court systems within the Ninth Circuit, which will not know whether to follow circuit or Supreme Court precedent. Finally, Judge Kleinfeld reiterated his view that, under the panel majority's decision, "[w]e have effectively turned ourselves into the supreme court of the nine states in our circuit." Pet. App. 28a-29a.

Judge Bea (joined by Judges Kozinski, O'Scannlain, and Kleinfeld) also dissented. Judge Bea opined that the court had erroneously treated an "inherently prejudicial" courtroom practice as structural error requiring automatic reversal, contrary to *Williams* and *Flynn*. Pet. App. 29a-30a.

SUMMARY OF ARGUMENT

1. The Ninth Circuit violated AEDPA by failing to defer to a state court decision that reasonably fits within the matrix of this Court's holdings concerning a criminal defendant's right to a fair trial. In *Holbrook* v. *Flynn*, 475 U.S. 560 (1986), and *Estelle* v. *Williams*, 425 U.S. 501 (1976), this Court established a general principle that courtroom practices sometimes might be so inherently prejudicial as to violate the defendant's right to a fair trial. Neither *Flynn* nor *Williams*, however, involved a courtroom practice similar to that in the instant case. The contours of the Court's general rule, including what factors the courts should consider in assessing the impact of a courtroom practice, are likewise unclear. Where faced with applying a general rule, with no factually similar Supreme Court cases and little guidance on the appropriate factors for consideration in its analysis, the state court should be

given the maximum amount of deference. Habeas relief should not lie under these circumstances unless the state court's decision exceeds all bounds of reasonableness.

Instead of giving maximum deference to the state court's application of this Court's holdings in *Flynn* and *Williams*, the Ninth Circuit granted relief on the basis of its own pre-AEDPA case, *Norris* v. *Risley*, 918 F.2d 828 (9th Cir. 1990). In relying on *Norris* to grant habeas relief, the Ninth Circuit violated AEDPA's requirement that only the holdings of this Court determine what federal law is "clearly established." Neither circuit nor state precedent has any impact on what is clearly established federal law for purposes of 28 U.S.C. § 2254(d)(1). If a federal habeas court looks to circuit or state precedent to help define clearly established federal law for purposes of § 2254(d)(1), then such law is not clearly established by this Court.

The Ninth Circuit's wholesale reliance on *Norris* likewise violated § 2254(d)(1)'s requirement that habeas relief not issue unless the state court's application of clearly established federal law was "objectively unreasonable." While this Court has instructed that circuit and state cases may assist in demonstrating that a state court's application of federal law was reasonable, such cases remain only instructive. In any event, circuit and state cases cannot by themselves demonstrate that a state court's application of this Court's authority was unreasonable, no matter how strong their numbers. The end question under AEDPA is not whether the state court decision comports with *any* circuit or state authority, but simply whether it is an objectively reasonable application of this Court's holdings.

2. In addition, and in violation of this Court's instructions in *Woodford* v. *Visciotti*, 537 U.S. 19 (2002) (per curiam), the Ninth Circuit selectively parsed the state court opinion to tease out what it mistakenly characterized as an incorrect standard employed by the state court. The context of the state court's recitation of the standard makes the Ninth Circuit's interpretation untenable. While the state court's recitation of the applicable standard was arguably imprecise, it was neither contrary to nor an unreasonable application of this Court's precedent.

3. Finally, contrary to *Deck* v. *Missouri*, 544 U.S. 622 (2005), the Ninth Circuit erroneously conflated the notion of "inherent prejudice" with that of structural error, concluding that a finding of inherent prejudice requires reversal without further inquiry. This Court has explicitly held that while a showing of inherent prejudice may relieve a defendant from showing actual prejudice, it does not remove the opportunity for the state to show harmlessness.

ARGUMENT

THE STATE COURT'S DECISION DESERVED HEIGHTENED DEFERENCE UNDER AEDPA SINCE IT INVOLVED THE APPLICATION OF A GENERAL RULE WITH UNCLEAR CONTOURS, AND NO CASES OF THIS COURT ADDRESS SIMILAR FACTS

AEDPA dramatically modified federal habeas review of state judgments. *Bell* v. *Cone*, 535 U.S. 685, 693 (2002). AEDPA eliminated independent federal review of state court adjudications on the merits, instituting instead

a "highly deferential standard" of review. *Lindh* v. *Murphy*, 521 U.S. 320, 333 n.7 (1997). Under AEDPA, where the state court has adjudicated a federal claim such as respondent's on the merits, habeas corpus relief lies only where the state court decision was "contrary to, or involved an unreasonable application of," clearly established Supreme Court law. 28 U.S.C. § 2254(d)(1). An unreasonable application is one that "identifies the correct governing legal rule from this Court's cases but unreasonably applies it to the facts of the particular state prisoner's case." *Williams* v. *Taylor*, 529 U.S. 362, 405 (2000).

The Ninth Circuit here recited § 2254(d)(1) and the limitations it imposes. The court never honored those limitations, however. Instead of basing its decision strictly on the clearly established holdings of this Court, it based its decision on its own pre-AEDPA circuit law. Instead of determining whether the state court decision was objectively reasonable, the Ninth Circuit overturned the decision merely because it disagreed with it.

A. The Ninth Circuit's Wholesale Reliance On *Norris* Contravened AEDPA

The Ninth Circuit's sweeping reliance on *Norris* v. *Risley*, 918 F.2d 828 (9th Cir. 1990), to overturn respondent's murder conviction is unprecedented in its disregard for 28 U.S.C. § 2254(d)(1). The Ninth Circuit used *Norris* not only to determine what law is clearly established, but also to conclude dispositively that the state court's refusal to follow *Norris* was unreasonable. As a practical matter, the Ninth Circuit simply reviewed the state court judgment de novo.

1. Circuit and state precedent have no role in defining or shaping "clearly established" federal law for purposes of § 2254(d)(1)

Section 2254(d)(1) limits the source of "clearly established federal law" to the holdings of this Court alone. *Williams* v. *Taylor*, 529 U.S. at 412. Neither circuit nor state authority impacts what law is clearly established for purposes of § 2254(d)(1). Cf. *Tyler* v. *Cain*, 533 U.S. 656, 663 (2001) (interpreting "by the Supreme Court" in § 2244(d)(2)(A)(i) to mean "not by the decisions of the lower court or by the combined action of the Supreme Court and the lower courts, but simply by the action of the Supreme Court"). This Court has never suggested otherwise.

Moreover, the legal principle upon which the habeas petitioner relies must be announced by this Court definitively. *Mitchell* v. *Esparza*, 540 U.S. 12, 17 (2003) ("A federal court may not overrule a state court for simply holding a view different from its own, when the precedent from this Court is, at best, ambiguous."); see *Kane* v. *Espitia*, 126 S. Ct. 407, 408 (2005) (per curiam) (noting where circuits are split but Supreme Court has not expressly ruled on an issue, no clearly established law exists). "Section 2254(d)(1) would be undermined if habeas courts introduced rules not clearly established under the guise of extensions to existing law." *Yarborough* v. *Alvarado*, 541 U.S. 652, 666 (2004).

This Court has never addressed the propriety of courtroom spectators during a criminal trial wearing buttons or other paraphernalia depicting a victim. See Pet. App. 22a, 48a; see also Recent Case, Musladin *v.* Lamarque, *403 F.3d 1072 (9th Cir. 2005)*, 119 HARV. L. REV. 1931, 1935 n.44 (2006) ("There are very few Supreme Court

opinions that explicitly address what constitutes deprivation of a fair trial."). *Holbrook* v. *Flynn*, 475 U.S. 560 (1986), and *Estelle* v. *Williams*, 425 U.S. 501 (1976), while not involving those circumstances, provide the closest Supreme Court authority for reviewing a claim of constitutional error in permitting spectators to wear buttons at a criminal trial. In *Flynn*, discussed by the state court, Pet. App. 74a-75a, the Court held that the presence of several armed uniformed officers in the spectators' row directly behind the defendant was not inherently prejudicial. 475 U.S. at 568-69. In *Williams*, the Court held that forcing a defendant to wear prison clothes at trial was inherently prejudicial. 425 U.S. at 530 n.10.

Flynn and *Williams* clearly establish a general rule that some courtroom practices might be "so inherently prejudicial that [the defendant] was thereby denied his constitutional right to a fair trial." *Holbrook* v. *Flynn*, 475 U.S. at 570 (armed, uniformed officers not inherently prejudicial); see *Estelle* v. *Williams*, 425 U.S. 501 (prison clothing inherently prejudicial); see also *Deck* v. *Missouri*, 544 U.S. 622 (visible shackling inherently prejudicial). *Flynn* and *Williams* do not, however, directly address conduct by courtroom spectators. Thus, while *Flynn* and *Williams* clearly established a general rule, it is not at all clearly established that the rule controls the instant circumstances. Cf. Pet. App. 22a ("The only question for us is whether there is any Supreme Court authority that holds that silent signals of affiliation by spectators in a courtroom deny a defendant due process by eroding his presumption of innocence. The answer is that there is no such case.") (Kleinfeld, J., dissenting from order denying rehearing en banc); see also *Estelle* v. *McGuire*, 502 U.S. 62, 72-73 (1991) (noting that beyond specific guarantees

listed in Bill of Rights, Due Process Clause has limited operation, and that Court has defined very narrowly the category of infractions that violate "fundamental fairness"). If not barring habeas relief altogether, see *id.*, this uncertainty should have prescribed additional deference towards the state court decision.

Despite AEDPA's limitations and the highly general nature of this Court's clearly established principle regulating courtroom practices, the Ninth Circuit announced that its own precedent "has persuasive value" in determining "what law is 'clearly established.'" Pet. App. 5a (citing *Duhaime* v. *Ducharme*, 200 F.3d 597, 600 (9th Cir. 2000)). The Ninth Circuit's statement was not an isolated misstep, but a pervasive theme throughout its opinion. See Pet. App. at 7a (under heading of "clearly established federal law," stating *Norris* "has persuasive value in an assessment of the meaning of the federal law that was clearly established"), 9a (state court misapplied "*Williams* test, as it was explained in *Norris*"; affording *Norris* "persuasive weight when determining the federal law established by *Williams*"), 14a ("objectively unreasonable in light of *Norris*"). On more than one occasion, the Ninth Circuit faulted the state court for its alleged misapplication of *Norris*, as opposed to this Court's precedent. See Pet. App. 8a-9a, 13a-14a. It is clear from the Ninth Circuit's own words that it in fact used circuit precedent to *define* the applicable "clearly established" federal law. See Recent Case, *supra*, 119 HARV. L. REV. 1931; Pet. App. 5a, 7a, 9a, 14a.

The Ninth Circuit attempted to justify its reliance on *Norris* by asserting that the state court had "identified *Norris* as setting forth the operative law as announced by the Supreme Court, and . . . sought to apply *Norris* when reaching its determination." Pet. App. 8a-9a. The assertion

is untrue and irrelevant. The state court did no more than distinguish *Norris*. Pet. App. 74a-75a. Regardless, since circuit law does not control under § 2254(d)(1), surely a state court may ignore, address, or even misapply circuit law without thereby suffering a later adverse decision under § 2254(d)(1). The state court was not bound by the circuit court's earlier decision, even on matters of federal law. *People* v. *Bradley*, 1 Cal. 3d 80, 86, 460 P.2d 129, 132, 81 Cal. Rptr. 457, 460 (1969); see *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 58-59 n.11 (1997) (citing *Lockhart* v. *Fretwell*, 506 U.S. 364, 375-76 (1993) (Thomas, J., concurring)); *Bell* v. *Hill*, 190 F.3d 1089, 1093 (9th Cir. 1999). AEDPA does not permit a federal habeas court to review the state court's reasoning concerning decisions of federal circuit courts.

The Ninth Circuit's reliance on circuit authority to define clearly established federal law under § 2254(d)(1) was not simply nominal. The Ninth Circuit reversed respondent's murder conviction because it believed "*Norris* simply cannot reasonably be distinguished." Pet. App. 13a. If, as here, a circuit court may use its own authority to define or extend clearly established federal law under § 2254(d)(1), then that provision as amended by AEDPA is vitiated. See *Yarborough* v. *Alvarado*, 541 U.S. at 666. Put differently, if circuit or state precedent is necessary to define what law is clearly established, then such law is not clearly established by this Court.

The only "rule" the Ninth Circuit was permitted to consider as *authority* under § 2254(d)(1), was the general principle set forth in *Flynn* and *Williams*: that some courtroom practices might be "so inherently prejudicial that [a defendant] was thereby denied his constitutional right to a fair trial." *Flynn*, 475 U.S. at 570. The Ninth Circuit plainly violated § 2254(d)(1)'s requirement of

basing habeas relief only upon "clearly established" law enunciated in the holdings of this Court. *Williams* v. *Taylor*, 529 U.S. at 412.

2. The state court decision deserved heightened deference in its application of this Court's general rule

Not only did the Ninth Circuit improperly use circuit court precedent to define clearly established law under § 2254(d)(1), it also failed to give any deference to the state court's decision applying clearly established law. Such latitude is especially appropriate because of the general nature of this Court's rule.

a. Habeas relief may be warranted upon an "objectively unreasonable" application of clearly established Supreme Court law. *Brown* v. *Payton*, 544 U.S. 133, 141 (2005); *Woodford* v. *Visciotti*, 537 U.S. at 24-25. In *Williams*, this Court declined to define the term unreasonable but suggested the term held no different meaning under § 2254(d)(1) than in other legal contexts. *Williams* v. *Taylor*, 529 U.S. at 410. The Court explained, "[T]he most important point is that an *unreasonable* application of federal law is different from an *incorrect* application of federal law." *Id.*

Under the circumstances of this case, the state court decision deserved the utmost deference. Not only is the rule at issue here general, it has appeared in varying formulations. See, e.g., *Holbrook* v. *Flynn*, 475 U.S. at 570 ("The only question we need answer is thus whether the presence of these four uniformed and armed officers was so inherently prejudicial that respondent was thereby denied his constitutional right to a fair trial."); *id.* ("whether 'an unacceptable risk is presented of impermissible factors

coming into play'" (quoting *Estelle* v. *Williams*, 425 U.S. at 505)); *id.* at 571 ("we simply cannot find an unacceptable risk of prejudice in the spectacle"); *id.* ("we cannot believe the use of the four troopers tended to brand respondent in [the jurors'] eyes 'with an unmistakable mark of guilt'" (quoting *Williams*, 425 U.S. at 518 (Brennan, J., dissenting))); *id.* at 572 ("All a federal court may do in such a situation is look at the scene presented to jurors and determine whether what they saw was so inherently prejudicial as to pose an unacceptable threat to defendant's right to a fair trial . . . ."). The Court has clarified that the level of deference required by § 2254(d)(1) increases where, as here, a general rule is involved: "The more general the rule, the more leeway courts have in reaching outcomes in case by case determinations." *Yarborough* v. *Alvarado*, 541 U.S. at 664 ("custody" test for purposes of *Miranda* is general).

Given that the precise contours of the Court's rule against inherently prejudicial courtroom practices remain unclear, maximum deference to state court decisions on this issue is surely warranted. See *Lockyer* v. *Andrade*, 538 U.S. 63, 76 (2003). The Court has not, for example, defined the factors courts should consider in assessing the prejudicial impact of a particular courtroom practice, or how much weight to afford such factors. Cf. *id.* at 72 (noting in Eighth Amendment context that while general "gross disproportionality" principle is clearly established, Supreme Court cases "exhibit a lack of clarity" on what factors are relevant to the principle). The Court also has not addressed the role of victims' rights or a spectator's First Amendment rights at a public trial. See generally Terri A. Belanger, *Symbolic Expressions in the Courtroom: The Right to a Fair Trial Versus Freedom of Speech*, 62

GEO. WASH. L. REV. 318 (1994) (discussing *Norris* and considerations of spectator free speech). That neither *Flynn* nor *Williams* involved facts similar to those here only adds to the uncertain reach of the general principle announced in those decisions. These combined circumstances warrant the utmost deference to the state court's decision. Stated another way, given the broad and imprecise nature of this Court's rule, a federal habeas court must be especially diligent not to take a grudging approach to its assessment of state court reasonableness. Instead, habeas relief should not lie unless the state court's conclusion exceeds all bounds of reasonableness.

b. The precise role, if any, of circuit and state cases in evaluating the reasonableness of a state court's application of Supreme Court precedent under § 2254(d)(1) has not been resolved. This Court has indicated that the existence of circuit and state cases reaching the same result as the state court "under similar circumstances" may confirm that a state court's decision was reasonable. *Price* v. *Vincent*, 538 U.S. 634, 643 & n.2 (2003). The Court otherwise has not addressed the question, however.

Circuit decisions are not entirely consistent on the question. Some circuit courts have found that lower federal court decisions are instructive on whether a given application of Supreme Court authority is reasonable. See, e.g., *Ouber* v. *Guarino*, 293 F.3d 19, 26-27 (1st Cir. 2002) (finding helpful precedents from lower courts in determining how a general standard applies); *Chadwick* v. *Janecka*, 312 F.3d 597, 613 (3d Cir. 2002) (holding federal courts not precluded from considering lower court decisions when evaluating whether the state court's application of law was reasonable); *Williams* v. *Bowersox*, 340 F.3d 667, 671 (8th Cir. 2003) (holding reasonableness of state court's application

of Supreme Court precedent may be established by showing other circuits similarly applied the precedent); *Duhaime* v. *Ducharme*, 200 F.3d 597, 600 (9th Cir. 2000) (finding circuit cases persuasive in determining if state court unreasonably applied Supreme Court law). Other circuit courts are more restrictive in their application of lower court authority in reviewing state court judgments, treating such authority as dicta or precluding its consideration altogether. See, e.g., *Mitzel* v. *Tate*, 267 F.3d 524, 531 (6th Cir. 2001) (holding habeas court may not look to circuit decisions in deciding if state court decision unreasonably applied clearly established federal law); *Bell* v. *Jarvis*, 236 F.3d 149, 162 (4th Cir. 2000) (finding circuit law has no determinative or precedential effect; "At best, it constitutes a body of constitutional dicta."); *Bocian* v. *Godinez*, 101 F.3d 465, 471 (7th Cir. 1996) (recognizing federal courts no longer permitted to apply circuit law, but must look exclusively to Supreme Court cases).

Despite inconsistency among the federal courts, there appears to be no authority supporting the Ninth Circuit's view that a pre-AEDPA circuit court decision may dictate that a state court decision was an *unreasonable* application of Supreme Court authority under § 2254(d)(1). There is simply no difference between such treatment and pre-AEDPA independent review. See Recent Case, *supra*, 119 HARV. L. REV. at 1931 ("Ninth Circuit's circumvention of AEDPA's mandate likely represents a strategic expression of its own discomfort with the statute"), 1935 (*Musladin* "channels the Ninth Circuit's discomfort with enforcing AEDPA mandates"). If, as here, federal circuit law may compel habeas relief, then AEDPA's requirement that only an unreasonable application of a Supreme Court holding may justify habeas relief is null.

Moreover, while this Court has indicated that circuit and state cases may demonstrate that a state court's application of Supreme Court law was reasonable, see *Price* v. *Vincent*, 538 U.S. at 643 & n.2, it has not suggested the opposite: that circuit and state cases may demonstrate that a state court's application of Supreme Court law was *un*reasonable. The question under AEDPA is the objective reasonableness of the state court's decision under this Court's precedents, not the extent to which that decision comports with circuit and state cases. Circuit and state cases rightfully serve as examples of application of a Supreme Court precedent, but cannot constitute *authority* under AEDPA for defining an unreasonable application of this Court's precedent. See Pet. App. 26a ("saying that the state court decision is *not* unreasonable because some federal courts have reached similar conclusions is not at all the same as saying that the state court decision *is* unreasonable because a circuit court has reached a contrary conclusion") (Kleinfeld, J., dissenting from order denying rehearing en banc).

Indeed, non-AEDPA precedent from circuit or state courts hold no analytical value under § 2254(d)(1). A non-AEDPA circuit decision on a question of substantive federal law speaks only to error, and is not binding on state courts. See *Arizonans for Official English* v. *Arizona*, 520 U.S. at 58-59 n.11 (citing *Lockhart* v. *Fretwell*, 506 U.S. at 375-76 (Thomas, J., concurring)); *People* v. *Bradley*, 1 Cal. 3d at 86, 460 P.2d at 132, 81 Cal. Rptr. at 460.[2] An

[2] As the Fourth Circuit pointed out in addressing a claim similar to that raised here, *Norris* itself would have reached a different conclusion had it been decided under AEDPA: "[T]hat decision is relevant to this habeas case only insofar as it would have been objectively unreasonable under Supreme Court precedent to reach a contrary conclusion, and it

(Continued on following page)

incorrect or erroneous application of law, however, is different from an unreasonable application of that law. *Williams* v. *Taylor*, 529 U.S. at 410; see *Brown* v. *Payton*, 544 U.S. at 143; see also *Lockyer* v. *Andrade*, 538 U.S. at 75 ("clear error" standard "fails to give proper deference to state courts by conflating error (even clear error) with unreasonableness").

The difference between AEDPA and non-AEDPA decisions is not only one of substantial leeway in application, see § 2254(d)(1), but also practical relevance. A non-AEDPA decision on a question of substantive constitutional law is necessarily not confined to Supreme Court law, let alone "clearly established" Supreme Court law, as its source of authority. See 28 U.S.C. § 2254(d)(1). A non-AEDPA decision also has no occasion to address the reasonableness of conclusions other than that reached therein. Further, where, as here, a general due process standard is involved, non-AEDPA decisions hold even less value, as the scope of reasonableness increases depending on the generality of the rule. See *Yarborough* v. *Alvarado*, 541 U.S. at 664.

As Judge Kleinfeld recognized, the Ninth Circuit's reliance on circuit authority as binding in the face of AEDPA's mandates leaves state courts with conflicting guidance in addressing federal constitutional claims. Pet. App. 28a. State courts are not bound by circuit decisions, and are equally capable of evaluating claims of federal constitutional error. See *Arizonans for Official English* v.

---

most assuredly would not have been objectively unreasonable under Supreme Court precedent to reach a contrary conclusion in *Norris*." *Billings* v. *Polk*, 441 F.3d 238, 246-47 (4th Cir. 2006) (citations omitted).

Arizona, 520 U.S. at 58-59 n.11; *Brecht* v. *Abrahamson*, 507 U.S. at 636. Yet, under the Ninth Circuit's reasoning, state courts face the question of whether their evaluation of federal constitutional claims is assessed for reasonableness against this Court's holdings, or for error against Ninth Circuit law. Pet. App. 24a. Under the Ninth Circuit's reasoning, AEDPA did not affect habeas review at all. Congress did not, however, enact AEDPA as an idle exercise. See *Williams* v. *Taylor*, 529 U.S. at 403-07.

In sum, the Ninth Circuit's reliance on circuit authority to find conclusively that the state court unreasonably applied this Court's holdings was an abrogation of AEDPA. Although a circuit court may consider circuit and state cases to demonstrate that an application of this Court's authority was reasonable, no court has held that a state decision may be found unreasonable simply because a circuit court has reached a contrary conclusion on arguably similar facts. Pet. App. 26a.

c. Here, the state court decision rejecting respondent's claim was a reasonable application of this Court's precedents. The circumstances of this case are more analogous to *Holbrook* v. *Flynn* than *Estelle* v. *Williams*, and thus well within the "matrix" of this Court's decisions. See *Yarborough* v. *Alvarado*, 541 U.S. at 665; Pet. App. 23a; see also *Estelle* v. *McGuire*, 502 U.S. at 72-73 (noting that beyond specific guarantees listed in Bill of Rights, Due Process Clause has limited operation, and that Court has defined very narrowly the category of infractions that violate "fundamental fairness"). The challenged courtroom "practice" in *Flynn* consisted of four uniformed, armed state police officers sitting in the first row of the gallery, directly behind the defendants, throughout their two-month trial. *Flynn*, 475 U.S. at 562 n.2, 565, 570. The challenged practice here consisted of three family members

wearing buttons depicting the victim, Tom Studer, while sitting in the first row of the gallery behind the prosecutor during one or more days of respondent's two-week trial. J.A. 4, 6, 8.[3] The challenged practice in *Williams*, in contrast, consisted of the defendant being compelled to wear prison clothing during his trial. *Williams*, 425 U.S. at 502. *Williams* also involved equal protection concerns not present here or in *Flynn*. See *id.* at 505-06.

Not only are the instant circumstances more akin to those in *Flynn* than *Williams*, the challenged practice here is far less potentially prejudicial than the practice involved in either of those cases. The allegedly offending practice in *Flynn* and *Williams* was the result of state action. The critical fact in *Flynn* was the presence of uniformed state troopers to provide additional security, 475 U.S. at 570, while the critical fact in *Williams* was that the defendant had allegedly been *compelled* to wear prison clothing. See *Williams*, 425 U.S. at 506-13. Here, in contrast, there was no government endorsement of the display of the buttons or any "message" they allegedly sent.

The instant case is also similar to *Flynn* in the wide range of arguable inferences that a juror might draw from the buttons. See *Flynn*, 475 U.S. at 569. The buttons here bore only a photograph of Tom Studer, without any writing. J.A. 4, 6, 8. As to what, if anything, jurors might have gleaned, the state court found the buttons were "unlikely to have been taken as a sign of anything other than the normal grief occasioned by the loss of a family member."

---

[3] The trial record reveals only that respondent's counsel complained of the buttons on a single day at the start of trial. J.A. 3-4. The supplemental declaration submitted by respondent's mother in state habeas proceedings does not unambiguously allege that the buttons were displayed for more than a single day. J.A. 6.

Pet. App. 75a. In light of "reason, principle, and common human experience," *Williams*, 425 U.S. at 504, this was, if not the only reasonable inference, at least an eminently reasonable one. See *Flynn*, 475 U.S. at 569 (uniformed officers); *Billings* v. *Polk*, 441 F.3d at 247 (T-shirt worn by juror); *In re Woods*, 154 Wash. 2d 400, 416-18, 114 P.3d 607, 616-17 (2005) (ribbons); *State* v. *Lord*, 128 Wash. App. 216, 218-23, 114 P.3d 1241, 1242-45 (2005) (buttons), *review granted*, 156 Wash. 2d 1038 (2006); *People* v. *Houston*, 130 Cal. App. 4th 279, 309-20, 29 Cal. Rptr. 3d 818, 842-52 & n.9 (buttons) (distinguishing original, withdrawn *Musladin* opinion), *review denied*, 2005 Cal. LEXIS 10686 (2005); *Pachl* v. *Zenon*, 145 Or. App. 350, 353-60, 929 P.2d 1088, 1090-95 (1996) (buttons); *People* v. *King*, 214 Mich. App. 301, 305, 544 N.W.2d 765, 768 (1996) (buttons); *State* v. *Richey*, 171 W. Va. 342, 351-52, 298 S.E.2d 879, 888-89 (1982) (mere presence of spectator support); Pet. App. 17a, 26a-27a, 49a; see also *Davis* v. *State*, 2006 Tex. App. LEXIS 3882, **20-21 (May 3, 2006) (no showing of prejudice—"victim medallions" bearing picture); *Johnson* v. *Commonwealth*, 259 Va. 654, 676, 529 S.E.2d 769, 781-82 (2000) (same—buttons); *Cagle* v. *State*, 68 Ark. App. 248, 248-50, 6 S.W.3d 801, 801-03 (1999) (same—buttons); *Nguyen* v. *State*, 977 S.W.2d 450, 457 (Tex. App.) (same—buttons), *aff'd*, 1 S.W.3d 694 (Tex. Crim. App. 1998); *Buckner* v. *State*, 714 So. 2d 384, 388-89 (Fla. 1998) (same—photos); *State* v. *Speed*, 265 Kan. 26, 47-48, 961 P.2d 13, 29-30 (1998) (same—buttons); *Kenyon* v. *State*, 58 Ark. App. 24, 26-35, 946 S.W.2d 705, 706-11 (1997) (same—buttons); *State* v. *Nelson*, 705 So. 2d 758, 763 (La. Ct. App. 1997) (same—T-shirts)); *Howard* v. *State*, 941 S.W.2d 102, 117-18 (Tex. Crim. App. 1996) (same—uniformed officers); *State* v. *Braxton*, 344 N.C. 702, 709-10, 477 S.E.2d 172, 176-77 (1996) (same—buttons); *Mitchell* v. *State*, 884 P.2d 1186, 1196 (Okla. Crim. App. 1994) (same—buttons);

State v. *Bradford*, 254 Kan. 133, 141-42, 864 P.2d 680, 686-87 (1993) (same—buttons); *State* v. *McNaught*, 238 Kan. 567, 576-81, 713 P.2d 457, 466-68 (1986) (same—buttons); cf. *Williams*, 425 U.S. at 567 ("jurors are quite aware that the defendant appearing before them did not arrive there by choice or happenstance"); *Whitehead* v. *Cowan*, 263 F.3d 708, 723-25 (7th Cir. 2001) ("Any jury would expect that a close relative of the victim would have strong emotions towards the suspected killer."); *Kinnamon* v. *Scott*, 40 F.3d 731, 734 (5th Cir. 1994) ("That the young girl was upset and angry at the person accused by the state as the murderer of her father communicated nothing new to the jury.").

The Ninth Circuit's holding, that only a single, prejudicial message could be gleaned from an unadorned photo, "was nowhere close to the mark." *Yarborough v. Alvarado*, 541 U.S. at 665; see Pet. App. 13a. The Ninth Circuit found, "The buttons essentially 'argue' that Studer was the innocent party and that the defendant was necessarily guilty; that the defendant, not Studer, was the initiator of the attack, and, thus, the perpetrator of a criminal act." Pet. App. 13a. The Ninth Circuit's interpretation of the buttons is built on several compound inferences, *none* of which are reflected by the record. These include: that any juror in fact saw the buttons at all; that any juror recognized who was depicted in the buttons (no non-autopsy photos of Tom Studer were introduced at trial); that any juror knew the spectators wearing the buttons had an affiliation with Studer (none of the three testified at trial); that anything about the three spectators suggested they had firsthand knowledge of the crime; and that the image depicted on the buttons depicted Studer in any particular light, let alone "represented him as the innocent party." See Pet.

App. 13a. Indeed, the number of unknown circumstances on this record makes even more varied the universe of available inferences to be drawn from a button bearing only a photo.

Even assuming the Ninth Circuit's detailed "message" were plausible, however, it matters little in the equation. Pet. App. 26a. One plausible inference does not invalidate other equally reasonable inferences. That is, the only relevant point is that the state's assessment of the buttons *was* a reasonable one. Pet. App. 26a; see *Woodford* v. *Visciotti*, 537 U.S. at 26-27 (Ninth Circuit's conclusion "perhaps" correct, but state court's conclusion was not objectively unreasonable); *Lockyer* v. *Andrade*, 538 U.S. at 75 (federal court's "firm conviction" that state decision was erroneous not sufficient; state decision must be objectively unreasonable); cf. *Collins* v. *Rice*, 126 S. Ct. 969, 975-76 (2006) ("Reasonable minds reviewing the record might disagree about the prosecutor's credibility, but on habeas review that does not suffice to supersede the trial court's credibility determination."); *Donnelly* v. *DeChristoforo*, 416 U.S. 637, 647 (1974) ("a court should not lightly infer that a prosecutor intends an ambiguous remark to have its most damaging meaning or that a jury, sitting through lengthy exhortation, will draw that meaning from the plethora of less damaging interpretations").

As for the Ninth Circuit's criticism that the state court did not look "beyond the general sentiment" of the buttons, Pet. App. 14a, there is nothing to support it. That no offending "message" was found does not mean the state court did not diligently consider and analyze all of the circumstances. Rather, the state court simply found there was no "message" beyond the general sentiment of the Studer family's grief. That conclusion, as discussed, was

objectively reasonable, regardless what the Ninth Circuit itself subjectively concluded.

The state appellate court's assessment of the buttons as not inherently prejudicial was not without other support. The trial judge, for example, found no prejudicial effect in the buttons. J.A. 4. The judge viewed the buttons, was present throughout the trial, and was in the best position to determine any potential prejudicial effect the buttons might have had. See *Arizona* v. *Washington*, 434 U.S. 497, 514 (1978); *United States* v. *Rutledge*, 40 F.3d 879, 884 (11th Cir. 1994); *State* v. *McNaught*, 238 Kan. at 581, 713 P.2d at 468. The jurors also were instructed before trial and again before deliberations to base their verdict only on the evidence introduced at trial, and not to be swayed by sympathy, passion, or prejudice. RT 434-35, 2072-73; see J.A. 4. It is presumed they followed those instructions. *Weeks* v. *Angelone*, 528 U.S. 225, 234 (2000). Last, beyond the instant case, there does not appear to be any decision reversing a judgment on the basis of spectators wearing buttons bearing photographs of a victim. See *People* v. *Houston*, 130 Cal. App. 4th at 309-16, 29 Cal. Rptr. 3d at 842-52 & n.9; *State* v. *Lord*, 128 Wash. App. at 219-23, 114 P.3d at 1242-45; *Johnson* v. *Commonwealth*, 259 Va. at 675-76, 529 S.E.2d at 781-82; *Cagle* v. *State*, 6 S.W.3d at 801-03; *Nguyen* v. *State*, 977 S.W.2d at 457; *State* v. *Speed*, 265 Kan. at 47-48, 961 P.2d at 29-30; *Kenyon* v. *State*, 58 Ark. App. at 26-35, 946 S.W.2d at 706-11; *People* v. *King*, 215 Mich. App. at 303-05, 544 N.W.2d at 768; *State* v. *Braxton*, 344 N.C. at 709-10, 477 S.E.2d at 176-77; *Mitchell* v. *State*, 884 P.2d at 1196; *State* v. *Bradford*, 254 Kan. at 141-42, 864 P.2d at 686-87; see also *In re Woods*, 154 Wash. at 416-18, 114 P.3d at 616-17 (spectators wore ribbons); *Buckner* v. *State*, 714 So. 2d at 388-89

(spectators held photos of victim); *State* v. *Nelson*, 705 So. 2d at 763 (T-shirts with victim's photo); *Pachl* v. *Zenon*, 145 Or. App. at 353-61, 929 P.2d at 1090-95 (Citizen Crime Victims United (CCVU) buttons); *State* v. *McNaught*, 238 Kan. at 577-81, 713 P.2d at 466-68 (MADD, SADD buttons). But cf. *Norris* v. *Risley*, 918 F.2d at 829-30 (granting habeas relief where spectators wore "Women Against Rape" buttons); *State* v. *Franklin*, 174 W. Va. 469, 474-75, 327 S.E.2d 449, 454-55 (1985) (reversing where spectators wore MADD buttons).

In addressing respondent's claim, the state court was faced with two Supreme Court cases involving dissimilar facts, and a generally applicable due process standard, the contours of which are unclear. It was, therefore, entitled to extensive latitude in applying this Court's caselaw. The state court's conclusion that the challenged buttons here were not inherently prejudicial was well within that latitude. For the reasons discussed above, the Ninth Circuit erred on several levels in concluding otherwise.

B. The Ninth Circuit's Piecemeal Reading Of The State Court Opinion Denied It The Deference Mandated By AEDPA

The Ninth Circuit's tendentious reading of the state court's decision was illogical and disregarded AEDPA. Even if the state court imprecisely used this Court's language in addressing respondent's claim, the state court neither acted contrary to nor unreasonably applied this Court's precedents in doing so, or in reaching its conclusion.

At the outset of addressing respondent's due process claim, the state court set forth the correct standard for

evaluating the claim, and identified this Court's most closely applicable case, *Holbrook* v. *Flynn*, 475 U.S. 560. Pet. App. 9a; see Pet. App. 74a-75a. The state court found the "simple photograph" of the victim on the buttons "unlikely to have been taken as a sign of anything other than the normal grief occasioned by the loss of a family member." Pet. App. 75a. The state court further concluded, "While we consider the wearing of photographs of victims in a courtroom *to be an 'impermissible factor coming into play,'* the practice of which should be discouraged, *we do not believe the buttons in this case branded defendant 'with an unmistakable mark of guilt' in the eyes of the jurors.*" Pet. App. 75a (quoting *Holbrook* v. *Flynn*, 475 U.S. at 570-71) (emphasis added).

Seizing on that last sentence, the Ninth Circuit ascribed to the state court a finding not merely of an "unacceptable risk" of "impermissible factors coming into play," but a finding that an "impermissible factor" *had* come into play, and thus that inherent prejudice had been established. Pet. App. 10a-11a; see *Estelle* v. *Williams*, 425 U.S. at 505. Once the state court implicitly found inherent prejudice, the Ninth Circuit reasoned, the state court ruled "contrary to" and "unreasonably applied" this Court's precedent by "requiring" respondent also to show that the buttons had "branded" him with an unmistakable mark of guilt. Pet. App. 10a. The Ninth Circuit's reasoning is flawed on many levels.

Formulary or verbatim statements of an applicable constitutional standard need not be recited by a state court for its judgment to withstand scrutiny under 28 U.S.C. § 2254(d)(1). *Early* v. *Packer*, 537 U.S. 3, 9 (2002) (per curiam). Indeed, shorthand or even imprecise recitations of an applicable standard will not invalidate a state

court's decision so long as the "fair import" of the decision is that the correct standard was applied. *Woodford* v. *Visciotti*, 537 U.S. at 24; *Early*, 537 U.S. at 9. To conclude otherwise would be inconsistent with the presumption that state courts are "fully qualified to identify constitutional error and evaluate its prejudicial effect," *Brecht* v. *Abrahamson*, 507 U.S. 619, 636 (1993), as well as § 2254(d)'s "'highly deferential standard for evaluating state-court rulings,'" which "demands that state court decisions be given the benefit of the doubt," *Visciotti*, 537 U.S. at 24 (quoting *Lindh* v. *Murphy*, 521 U.S. at 333).

The Ninth Circuit disregarded these prescriptions in holding that the state court's decision was both "contrary to" and involved an "unreasonable application" of this Court's precedent. Pet. App. 10a-14a. According to the Ninth Circuit, the state court "imposed an additional and unduly burdensome requirement" on respondent by "demanding that the challenged practice cause the 'brand[ing]' of the defendant with an unmistakable mark of guilt[ ]'—even though the *Williams* test for inherent prejudice had already been met." Pet. App. 10a.

The context of the state court's language forecloses the Ninth Circuit's interpretation. First, as noted, the state court precisely recited the correct standard at the outset of addressing respondent's claim. Pet. App. 74a. Second, the state court *contrasted Norris*, which had found constitutional error, and distinguished the buttons here as "unlikely to have been taken as a sign of anything other than the normal grief occasioned by the loss of a family member." Pet. App. 74a-75a. The state court surely did not intend to suggest that a display of "normal grief" establishes inherent prejudice. Third, the state court indicated

it was distinguishing between the "wearing of photographs of victims in a courtroom" *generally* as constituting an impermissible factor, versus "the buttons in this case" *specifically* as not "branding" respondent. See Pet. App. 75a. Fourth, while the state court considered "the wearing of photographs of victims in a courtroom" to be "an 'impermissible factor coming into play,'" it immediately followed that statement with the admonition that such a practice "should be discouraged." Pet. App. 75a; see also Pet. App. 49a-50a ("allowing the buttons was arguably not a prudent decision by the trial judge" (district court decision)). Had the state court intended to announce that the buttons in this case were inherently prejudicial, it would not have simply "discouraged" their use. See Pet. App. 75a. Last, the state court found that the buttons did not "brand" respondent with an "'unmistakable mark of guilt' in the eyes of the jurors." Pet. App. 75a (quoting *Holbrook* v. *Flynn*, 475 U.S. at 570-71). In *Flynn*, this Court itself, quoting from Justice Brennan's dissent in *Estelle* v. *Williams*, 425 U.S. at 518, used that very same language in concluding that inherent prejudice had not been established. *Flynn*, 475 U.S. at 571. The state court's use of this same phrase, which is unmistakably associated with the *absence* of inherent prejudice, is utterly inconsistent with the Ninth Circuit's conclusion that the state court implicitly found that the display of the buttons was in fact inherently prejudicial. Each of these aspects of the state court's decision, especially when the state court is given the "benefit of the doubt," *Woodford* v. *Visciotti*, 537 U.S. at 24, renders the Ninth Circuit's interpretation of the state decision untenable.

Equally unsound is the Ninth Circuit's conclusion that the state court imposed an "additional and unduly burdensome

requirement" on respondent by concluding that the buttons had not "branded him with an unmistakable mark of guilt." Pet. App. 10a. The Ninth Circuit's conclusion rests, again, on the faulty premise that the state court had *found* the buttons inherently prejudicial. Pet. App. 10a. The premise makes little sense under even the Ninth Circuit's own caselaw. The Ninth Circuit held the state court, by concluding that respondent had not been "branded," had imposed an additional and thus necessarily *different* requirement from requiring him to show an "impermissible factor" had come into play. Pet. App. 11a & n.2. The Ninth Circuit acknowledged, however, that it considered these tests *alternatives* to one another. Pet. App. 12a n.3 (citing *Williams* v. *Woodford*, 384 F.3d 567, 588 (9th Cir. 2004)). Indeed, federal and state courts alike have freely interchanged *Flynn*'s "branding" and "impermissible factor" language in this context. See, e.g., *Coy* v. *Iowa*, 487 U.S. 1012, 1034-35 (1988) (Blackmun, J., dissenting); *Hill* v. *Ozmint*, 339 F.3d 187, 200 & n.15 (4th Cir. 2003); *United States* v. *Olvera*, 30 F.3d 1195, 1197 (9th Cir. 1994); *United States* v. *Milner*, 962 F.2d 908, 915 (9th Cir. 1992); *Morgan* v. *Aispuro*, 946 F.2d 1462, 1465 (9th Cir. 1991); *Bell* v. *True*, 413 F. Supp. 2d 657, 720-21 (W.D. Va. 2006); *State* v. *Wilson*, 406 N.W.2d 442, 449 (Iowa 1987); *Marx* v. *State*, 987 S.W.2d 577, 581 (Tex. Crim. App. 1999); see also *United States* v. *Harris*, 703 F.2d 508, 512 (11th Cir. 1983) ("prison garb . . . clothes him with an unmistakable mark of guilt"); *Howard* v. *State*, 941 S.W.2d 102, 117 (Tex. Crim. App. 1996) ("reasonable probability that the conduct or expression interfered with the jury's verdict" "essentially interchangeable" with *Flynn*'s "unacceptable risk of impermissible factors coming into play"). The Ninth Circuit, however, seemingly viewed *Flynn*'s "branding" language as an alternative test when used by the Ninth

Circuit, but an additional and different test when used by the California courts. See Pet. App. 11a-12a & nn.2-3. Petitioner's point is not that *Flynn*'s "branding" language and "impermissible factor" language are synonymous, but rather that the Ninth Circuit's reasoning is unsound and explicable only as the "readiness to attribute error" this Court has condemned. See *Middleton* v. *McNeil*, 541 U.S. 433, 438 (2004); *Woodford* v. *Visciotti*, 537 U.S. at 24.

Even accepting the Ninth Circuit's reasoning and precedent, however, its conclusion is incorrect. If, as the Ninth Circuit believed, the state court of appeal found inherent prejudice using the "impermissible factor" language of *Flynn*, the fact remains the state court found *no* inherent prejudice using the "branding" language of *Flynn*. Pet. App. 75a. Where such perceived ambiguities arise, AEDPA commands that state decisions be given the benefit of the doubt. *Woodford* v. *Visciotti*, 537 U.S. at 24. Here, that benefit compels the conclusion that the state court, arguably imprecisely, used the "impermissible factor" language to indicate its disapproval of the use of buttons generally, but found no inherent prejudice in this case, using *Flynn*'s "branding" language. Pet. App. 75a.

Under *Flynn*, the "only question" a state court need answer under these circumstances is whether the challenged courtroom practice "was so inherently prejudicial that respondent was thereby denied his constitutional right to a fair trial." *Holbrook* v. *Flynn*, 475 U.S. at 570. The "fair import" of the state court's decision, particularly viewed through the deferential lens of § 2254(d)(1), is that *Flynn*'s question was asked and answered. The best interpretation of the state court's opinion here is that explained by dissenting Judge Thompson below: "[T]he state court's 'impermissible factor' comment is most

reasonably understood as reflecting that court's view that buttons bearing a victim's photograph should not be worn in a courtroom." Pet. App. 17a. "[T]he state court's additional comment that the buttons did not 'brand[] defendant "with an unmistakable mark of guilt'" is most reasonably understood as an explanation that the buttons were not 'so inherently prejudicial as to pose an unacceptable threat to [the] right to a fair trial.'" Pet. App. 18a (quoting *Holbrook* v. *Flynn*, 475 U.S. at 572) (brackets in *Musladin*); cf. Pet. App. 29a-30a ("Under *Flynn*, . . . it is possible to have a situation that is 'inherently prejudicial' but not '*so* inherently prejudicial as to pose an unacceptable threat to a defendant's right to a fair trial.'").

C. The Ninth Circuit's Conclusion That An Inherently Prejudicial Courtroom Practice Constitutes Structural Error Is Contrary To This Court's Precedent

In addition to its disregard of AEDPA, the Ninth Circuit misapplied this Court's precedent on harmless error. Contrary to this Court's jurisprudence, the Ninth Circuit concluded that a showing of inherent prejudice under *Holbrook* v. *Flynn*, 475 U.S. 560, and *Estelle* v. *Williams*, 425 U.S. 501, requires automatic reversal, without any determination of prejudice.

As dissenting Judge Bea explained, the panel majority erroneously treated the presence of the three buttons at trial as structural error. Pet. App. 29a. The panel majority, it is true, did not expressly state that the alleged error was structural or reversible per se. The court held, nevertheless, that under *Flynn* and *Williams*, a finding of inherent prejudice ends the inquiry and "requires reversal." Pet. App. 10a; see also *id.* 11a n.1 ("As we held in *Norris*,

reversal is required if a defendant can prove *either* actual *or* inherent prejudice."), 12a ("a practice that brands a defendant as guilty would surely be sufficient to demonstrate 'inherent prejudice' and require reversal"). Consistent with that necessary conclusion of structural error, the court did not mention harmless error review or cite this Court's habeas corpus harmless error precedent, *Brecht* v. *Abrahamson*, 507 U.S. 619.

This Court has recognized that "most constitutional errors can be harmless." *Arizona* v. *Fulminante*, 499 U.S. 279, 306 (1991) (citing examples). "If the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other constitutional errors that may have occurred are subject to harmless-error analysis." *Rose* v. *Clark*, 478 U.S. 570, 579 (1986). Hence, the Court has found an error to be "structural," and thus subject to automatic reversal, only in a very narrow class of cases. *Neder* v. *United States*, 527 U.S. 1, 8 (1999). Examples include the complete denial of counsel, *Gideon* v. *Wainwright*, 372 U.S. 335 (1963); a biased trial judge, *Tumey* v. *Ohio*, 273 U.S. 510 (1927); racial discrimination in the selection of a grand jury, *Vasquez* v. *Hillery*, 474 U.S. 254 (1986); denial of self-representation at trial, *McKaskle* v. *Wiggins*, 465 U.S. 168 (1984); denial of a public trial, *Waller* v. *Georgia*, 467 U.S. 39 (1984); and a defective reasonable doubt instruction, *Sullivan* v. *Louisiana*, 508 U.S. 275 (1993). *Neder*, 527 U.S. at 8. Such errors "deprive defendants of 'basic protections' without which 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence . . . and no criminal punishment may be regarded as fundamentally fair.'" *Id.* at 8-9 (quoting *Rose*, 478 U.S. at 577-78).

Deck v. *Missouri*, 544 U.S. 622, explained that the presence of an "inherently prejudicial" courtroom practice —in that case shackling—may relieve the defendant from proving *actual* prejudice to establish a due process violation. 544 U.S. at 635. The Court did not, however, suggest such an error was structural, but instead expressly stated that it was subject to review for harmlessness. *Id.* (citing *Chapman* v. *California*, 386 U.S. 18, 24 (1967)); see also *Estelle* v. *Williams*, 425 U.S. at 506-08 (suggesting compelled wearing of prison garb subject to review for harmlessness); *United States* v. *Harris*, 703 F.2d 508, 512 (11th Cir. 1983) (reviewing for harmlessness where defendant compelled to wear prison garb); *Young* v. *Callahan*, 700 F.2d 32, 37 (1st Cir. 1983) (reviewing for harmlessness where defendant compelled to sit in prisoner's dock during trial instead of at counsel's table); Pet. App. 29a (interpreting *Williams* to authorize harmless error review). In the context of § 2254(d)(1) review, this means that, even if the defendant establishes an inherently prejudicial courtroom practice took place during his trial, the federal court may not grant habeas relief without determining whether the constitutional error "'had substantial and injurious effect or influence in determining the jury's verdict.'" *Brecht* v. *Abrahamson*, 507 U.S. at 638 (quoting *Kotteakos* v. *United States*, 328 U.S. 750, 776 (1946)).

The instant case demonstrates the need for harmless error review where an allegedly inherently prejudicial courtroom practice has been established. The buttons have never been placed in evidence. There is no indication how the photo on the buttons depicted Tom Studer. No court has seen the buttons except the state trial judge, who, in the best position to assess the buttons' effect, found no prejudice.

J.A. 4. Perhaps most significantly, no evidence was adduced from any of respondent's jurors. Beyond respondent's mother's declaration and trial attorney's unsworn statement that the Studer family sat near the jury box while wearing the buttons, J.A. 6, 8, there is no evidence that any of respondent's jurors saw the buttons, let alone recognized what or whom they depicted.

In sum, even if respondent can satisfy § 2254(d)(1), the alleged due process error remains subject to review for harmless error to determine whether the buttons had "substantial and injurious effect or influence in determining the jury's verdict." See *Brecht* v. *Abrahamson*, 507 U.S. at 638. The court of appeals erred in concluding otherwise.

CONCLUSION

The judgment of the Ninth Circuit Court of Appeals should be reversed.

Dated: June 20, 2006

Respectfully submitted,

BILL LOCKYER
Attorney General of California

ROBERT R. ANDERSON
Chief Assistant Attorney General

GERALD A. ENGLER
Senior Assistant Attorney General

DONALD E. DE NICOLA
Deputy Solicitor General

PEGGY S. RUFFRA
Supervising Deputy Attorney General

GREGORY A. OTT
Deputy Attorney General
Counsel of Record

Counsel for Petitioner